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87-1263

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CATALINO LASTIMOSA,
Petitioner,
vs.

HUGHES AIRCRAFT COMPANY
and JACK CURTIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the matter at issue, the Ninth Circuit Panel refused to consider this Court's decision in Caterpillar, Inc. v. Williams (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, another Ninth Circuit Panel decision, Paige v. Henry J. Kaiser Co., (9th Cir., 1986) 826 F.2d 857, or other generally applicable principles of Federal Pre-emption, in holding that petitioner's claims for damages based on respondents' violation of the California Occupational and Health Safety Act were completely pre-empted by Section 301 of the Labor Management Relations Act because petitioner may have also had claims under his CBA. In light of this holding, the questions presented here are:

1. Whether claims for damages, based on a violation of California statutes, man-

dating Occupational Health and Safety, are pre-empted by Section 301 of the Labor Management Relations Act, where a labor contract also contains health and safety regulations.

2. If a federal court accepts jurisdiction on the basis of the well-plead complaint rule, is it required to give the plaintiff leave to amend before dismissing his case on the basis that the implied claim, in fact, was not plead?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, **Catalino Lastimosa, and the Respondents, Hughes Aircraft Company and Jack Curtis.**

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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

CATALINO LASTIMOSA,

Petitioner,

vs.

HUGHES AIRCRAFT COMPANY
and JACK CURTIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, CATALINO LASTIMOSA, respectfully prays that a Writ of Certiorari issue to review the judgment and modified opinion of the United States Court of Appeals, for the Ninth Circuit, entered in the above-entitled proceeding on November 13, 1987.

OPINIONS BELOW.

The unmodified opinion of the United States

Court of Appeals for the Ninth Circuit is not reported and was originally filed July 22, 1987. It is reprinted herein in the Appendix to this Petition at pages A1 through A8 . The Court of Appeals order modifying its opinion and denying rehearing and rehearing en banc is not reported. It is reprinted in the Appendix to this Petition at pages A9 through A10. The decision of the District Court has not been reported. It is reprinted in the Appendix to this Petition at pages A11 through A20 .

JURISDICTION

Petitioner originally brought this action in the Superior Court of California, County of Los Angeles. Respondents removed the action to the United States District Court, Central District of California, alleging federal jurisdiction under 28 U.S.C.§1141.

Thereafter, respondents moved for summary judgment, contending petitioner's claims were preempted by Section 301 of the Labor Management Relations Act. The motion was granted on April 16, 1986. By decision filed July 22, 1987, the Court of Appeal affirmed the District Court's decision and, in an order filed October 30, 1987, modified its earlier opinion and denied Catalina Lastimosa's Motion for Rehearing or Rehearing En Banc. Judgment was entered on November 13, 1987. Catalina Lastimosa invokes the jurisdiction of this Court pursuant to 28 U.S.C.§1254(1).

STATUTES INVOLVED

This case involved the relationship of the California Occupational Health and Safety Act (Cal-OSHA), California Labor Code Sections 6300, et. seq., most specifically, Sections 6310 and 6311, and Section 301 of the Labor Management

Relations Act. Relevant portions of Cal-OSHA are reprinted in Appendix "B", along with Section 301 of the Labor Management Relations Act.

STATEMENT OF THE CASE

Petitioner, Catalino Lastimosa ("Lastimosa") was an employee of Respondent Hughes Aircraft Company ("Hughes"), at its Torrance, California, 1/ facility. From November, 1982, to approximately June 28, 1984, he was employed as a furnace operator in the furnace room.

Lastimosa worked with gas furnaces used to braze electronic circuits. The external surfaces of the furnaces were wrapped in asbestos. During the time Lastimosa worked in the furnace room,

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1/ The facts set forth in the instant petition are supported by the excerpts of record submitted in Lastimosa v. Hughes, et al., District Court Case No. 85-2780, Court of Appeals Case No. 86-5899.

large amounts of dust during the brazing process. The dust and abestos caused Lastimosa respiratory problems.

Beginning in March, 1984, Lastimosa requested Hughes' approval to wear a paper dust mask when he was working in the furnace room. Hughes issued the mask to Lastimosa, which he wore without incident until May 30, 1984. On that date and in response to the complaints made by Lastimosa, Cal-Osha inspectors conducted an inspection of the furnace room at the Hughes facility. On June 12, 1984, Hughes, without regard to the fact that use of the mask was improving Lastimosa's respiratory problems, informed Lastimosa that he would no longer be permitted to wear the dust mask while working.

At all relevant times, Lastimosa was a member of the Electronic and Space Technician's Local 1553 of the AFL-CIO

(the "Union"). Through collective bargaining, the Union and Hughes had entered into a contract governing terms and conditions of Lastimosa's employment at Hughes. That contract required Hughes to provide its employees a safe place to work and required all employees to wear all issued safety devices. It also provided that no employee could be terminated without cause and set forth a grievance mechanism for dispute resolution. The final step in the grievance procedure was arbitration, which the Union was required to initiate.

Initially, in response to Hughes' order, Lastimosa stopped wearing the paper mask and filed a grievance, asserting that he was required and authorized to wear the paper mask under the CBA.

While his grievance was pending, and

on June 22, 1984, Hughes began replacing the abestos on the furnaces with new abestos, thereby increasing the risk of asbestos exposure. Lastimosa refused to work without the paper mask and was removed from the premises. Hughes notifed Lastimosa by letter that unless he returned to work on June 28, 1984, and agreed to work without the dust mask, he would be terminated. Lastimosa refused to agree to work without the mask and was terminated by Hughes on June 28, 1984. In October, 1984, Lastimosa's grievance was denied and his Union refused to take the matter to arbitration.

Lastimosa dropped his CBA claims and on February 22, 1985, filed this action in the Superior Court of California, County of Los Angeles. He sought damages from respondents, contending his termination violated California Labor Code

Sections 6310 and 6311, which make it unlawful for an employer to terminate an employee for filing a complaint with Cal-OSHA or for refusing to work in an unsafe work environment. He claimed both the lost wages authorized by statute and tort damages under the wrongful discharge theory recognized by the California Supreme Court in Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167.

Respondents Hughes and Curtis were served with the summons and complaint and immediately removed the action to federal court, claiming federal jurisdiction under 29 U.S.C.§1441. Respondents asserted that the action arose under the laws of the United States because Lastimosa's claims, although framed under state law, were required to be brought under Section 301 of the Labor Management Relations Act.

After discovery, and on February 20, 1986, respondents moved for summary judgment, again contending that petitioner's claims were required to be brought under the CBA; that said agreement required arbitration, which the Union refused to process in petitioner's case, and therefore, that the case should be dismissed because it did not allege a breach of the Union's duty of fair representation.

Lastimosa opposed the motion, contending that the district court did not have jurisdiction to hear his claims because they were based entirely on state law and that the case should therefore be remanded to state court. The district court found that the California Labor Code statutes at issue directly impacted upon the employment relationship by directing the duties of employers with

respect to Occupational Health and Safety. It concluded that enforcing these statutes by way of a wrongful discharge suit would clearly interfere with the collective bargaining system and federal labor process. Therefore, the district court ruled that federal labor law preempted and prohibited the maintenance of both the statutory and public policy wrongful discharge claims made by Lastimosa. The court went on to dismiss the action because Lastimosa had not alleged that his Union breached its duty of fair representation in failing to take his CBA claims to arbitration.

Lastimosa appealed the decision to the Ninth Circuit Court of Appeals. He argued that the district court erred in not allowing him to be the master of his complaint and in finding that his state law claims were preempted by Section 301

of the Labor Management Relations Act; because Congress intended state regulation of Occupational Health and Safety and the laws at issue were separate from any claims he may have had under the CBA. He also argued that it was error for the district court to imply petitioner a remedy under the CBA to exercise jurisdiction over his claims by virtue of the well-plead complaint rule, and then to dismiss the complaint without allowing him to assert such federal claims.

The Ninth Circuit Court of Appeals held that the statutes at issue were not directed at the general public, and the policies represented by the state causes of action were not independent of the employment relation. It found that the CBA provided Lastimosa no less protection than the statutes on which he relied, and held that to uphold the state cause of

action would undermine federal labor policies favoring uniform interpretation of collective bargaining agreements and the exclusivity of union-employer grievance procedures. Accordingly, it also ruled that Lastimosa's state law claims were completely preempted by the Labor Management Relations Act. It also refused to find that the district court erred in not allowing petitioner leave to state a claim to also assert that his Union violated its duty of fair representation for not taking his claims to arbitration.

After the matter was submitted for consideration, this court decided Caterpillar v. Williams (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, wherein it recognized that an employee covered by a CBA may nonetheless have legal rights arising from the employment

relationship that exist independent of the CBA, and because the employee is the master of his complaint, he may assert those independent rights in the state court if he chooses. Similarly, after the decision, another panel of the Ninth Circuit Court of Appeals decided the case of Paige v. Henry J. Kaiser Company, 826 F.2d 857 (9th Cir., 1987), holding that a claim for a wrongful termination, based on California's public policy as expressed in Cal-OSHA, was not preempted by Section 301 of the Labor Management Relations Act, or the National Labor Relations Act.

Lastimosa timely petitioned the Ninth Circuit Panel which decided this case for a rehearing to reconsider in light of Caterpillar, Paige, and well established federal law concerning preemption. The Panel unanimously refused to rehear or

otherwise reconsider in light of the above-cited cases.

WHEREFORE, it is respectfully requested that this Court grant the writ of certiorari and order the Ninth Circuit to reconsider in light of the Caterpillar and Paige decisions, or otherwise consider the matter in the first instance.

REASONS FOR GRANTING THE WRIT

1. Lastimosa, As Master of His Complaint, Was Free to Ignore Any Federal Remedy He May Have Had Under The CBA, and Bring His Claim Based on State Law.

Only a few months ago, this Court in Caterpillar v. Williams, (1987) 482 U.S.--, 96 L.Ed.2d 318, 107 S.Ct.--, recognized that it is the plaintiff who is the master of his complaint and chooses on which theories he will proceed. The issue in Caterpillar was

whether an employee's state law claim for breach of an individual employment contract was completely preempted by Section 301 of the Labor Management Relations Act of 1947 (and the case therefore removable to federal court) because the employee was also governed by a CBA. In holding that it was not, this Court reasoned that an employee covered by a CBA may nonetheless have legal rights arising from the employment relationship that exist independent of the CBA, including state law contract rights, and because the employee is "the master of his complaint", he may assert those independent rights in state court if he so chooses:

> "Section 301 does not, as Caterpillar suggests, require that all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common

law created by Section 301.

> The Court has stated that not every dispute concerning employment or tangentially involving the provision of a collective bargaining agreement, is preempted by 301 or other provisions of Federal Labor Law. (Citations) Claims bearing no relationship to a collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by Section 301. (Citation)." Id. 96 L.Ed.2d at 330 Fn. 10.

The graveman of petitioner's state court complaint in this action was that he was fired by HUGHES because either he filed a complaint with the California Labor Board asserting that unsafe labor conditions existed at his jobsite; or for demanding his employer allow him to wear safety equipment necessary to make his workplace safe - retaliatory terminations specifically prohibited by California Labor Code Sections 6310 and 6311.

The rights afforded petitioner under Cal-OSHA, and in particular, the right protecting him from retaliatory termination, are rights afforded every employee in the State of California and are rights which exist independent of any CBA to which an employee may be a party. Similarly, the right of petitioner not to be terminated for reasons which contravene public policy (Tameny v. Atlantic Richfield Co. [1980] 27 Cal.3d 167) is an action in tort and separate from the employment contract.

Under no circumstances could the Ninth Circuit properly find preemption because the termination may also have violated the CBA. In Vaca v. Sipes(1967) 386 U.S.171, 179, this Court recognized that the doctrine of preemption has absolutely no application where it cannot be fairly inferred from the

activities of Congress that it intended exclusive jurisdiction to lie in federal courts. Concerning matters of Occupational Health and Safety, the Congress of these United States has specifically allowed states to assume responsibility for the development and enforcement of standards pursuant to a plan approved by the Secretary of Labor. (29 U.S.C.§667[c]; Hentzel v. Singer Co. [1982] 138 Cal.App.3d 290, 301.) California adopted Cal-OSHA (Labor Code Sections 6300, et seq.) in response to the invitation of the Congress that states assume jurisdiction in matters of occupational health and safety. When California complied with 29 U.S.C.§667, federal preemption was removed so that California could exercise its sovereign powers over occupational safety. United Airlines v. Occupational Safety and

Health Appeals Board (1982) 32 Cal.3d 762.

Therefore, the fact that petitioner may have had similar rights under the CBA, which, pursuant to the terms of that agreement, would have resulted in arbitration if the Union so desired to proceed, is not dispositive. The test is not whether or not the state statutes at issue are independent of the employment relationship, as the Ninth Circuit erroneously concluded, but whether the state right sought to be asserted is independent of the CBA.

By choosing to exercise jurisdiction over Occupational Health and Safety, and by creating standards, penalties and remedies for the violation of such standards, California has provided to its citizens rights independent of any CBA. See California Labor Code Section 6300.

In this case, Lastimosa sought to assert those independent state law rights but the Ninth Circuit erroneously concluded that he must rely solely on the CBA. But as this Court noted in Caterpillar, supra, the fact that plaintiff may have also had substantial rights under the CBA and could have brought suit under Section 301, is not dispositive, for as master of his complaint, he was not required to do so.

Indeed, in a case decided by a different panel of the Ninth Circuit Court of Appeals after the rendition of this case, the court specifically held that claims for wrongful termination based on an employer's termination in violation of OSHA are not preempted by Section 301 of the Labor Management Relations Act. Paige v. Henry J. Kaiser Co. 826 F.2d 857 (9th Cir., 1987).

This case is not distinguishable from Paige and therefore an inconcistency of decision on the issue exists within the Ninth Circuit. But since the decision in Paige is consistent with the Caterpillar decision, and this case is not, it is respectfully requested that this Court issue certiorari and order the Ninth Circuit to reconsider this matter on the basis of Caterpillar and Paige, or decide the matter in the first instance.

2. **If Lastimosa Was Required to Bring a Section 301 Claim as Opposed to His State Law Claims, the Ninth Circuit Court of Appeals Erred By Not Allowing Him to Assert That Federal Claim.**

As set forth early in this Petition, Lastimosa initially filed this case in state court seeking damages on purely state law theories. The respondents

removed the action to federal court, contending that as petitioner had a potential remedy under his CBA, the state law claims were completely preempted by Section 301 of the Labor Management Relations Act. The district court accepted jurisdiction on the basis of the artful pleading and well-plead complaint rules, finding that a properly plead complaint would have contained a cause of action based on Section 301 of the Labor Management Relations Act.

Throughout the proceedings, Lastimosa contended that he was not making any CBA claims, and wanted to rely solely on his state law claims. However, he requested that if the court found he was required to bring claims based on Section 301, that it allow him to proceed on such a claim.

After finding that Section 301 of the

Labor Management Relations Act preempted his state law claims, the district court dismissed the case because the complaint did not contain any allegation that the Union breached its duty of fair representation by failing to take the matter to arbitration. In so ruling, the district court did not specify any reason for not allowing petitioner to proceed on the implied 301 claim.

Federal Rule of Civil Procedure 15(a) states that leave to amend the complaint shall be freely given when justice so requires. Since the court implied a 301 claim to accept jurisdiction, justice required that at a miminum, petitioner be given the right to prosecute the implied claim.

It has always been recognized that controversy should be decided on the merits whenever practical, and therefore,

amendments should be liberally allowed. Comby v. Shell Oil Co. (1980 Court of Appeal 5th) 615 F.2d 698.

In its Opinion affirming the district court decision, the Court of Appeal did not discuss the district court's refusal to allow Lastimosa to proceed on a 301 claim. In response to Lastimosa's request for rehearing on that issue, the court simply modified the language of its Opinion, stating: "The district court did not err by failing to imply an amendment of plaintiff's complaint, to include a claim of the breach of the duty of fair representation." In short, neither the Court of Appeal nor the district court, gave any justifiable reason for not allowing petitioner to proceed on the federal claim which it had determined to be his remedy. Such a ruling is not an exercise of discretion, but an abuse of

discretion which is inconsistent with the spirit of the Federal Rules of Civil Procedure. Foman v. Davis (1962) 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227.

Therefore, it is respectfully requested that this court issue a writ of certiorari ordering the Ninth Circuit to reconsider in light of the foregoing decisions, or alternatively explain why petitioner is not entitled to prosecute the federal claim which the court implied was his remedy.

CONCLUSION

Petitioner respectfully submits that Congress intended that the States exercise their sovereign jurisdiction over Occupational Health and Safety. Once California complied with the prerequisites of 29 U.S.C.§667 and created statutory Occupational Health and Safety law, it provided California citizens new

rights and remedies independent of any collective bargaining agreement. Petitioner, as master of his complaint, was entitled to bring his Occupational Health and Safety claims under state law and ignore any claims he may have had under a collective bargaining agreement. Since the Ninth Circuit, in reaching a contrary conclusion did not follow the recent decision of this Court in Caterpillar v. Williams, or the decision of another Panel of the Ninth Circuit in Paige v. Henry J. Kaiser Co., it is respectfully requested that this Court issue the Writ and order the Ninth Circuit to reconsider in view of those cases.

Alternatively, the irreconciliable disagreement between the courts on the preemption issue reflects the need for resolution of these issues by this

Honorable Court, and it is therefore alternatively requested that this Court hear the matter in the first instance.

DATED: January 28, 1988 Respectfully Submitted

FRED L. WRIGHT

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOS, Plaintiff-Appellant,	)	CA NO. 86-5899 DC NO. 85-2780-RG
v	)	MEMORANDUM
HUGHES AIRCRAFT COMPANY, JACK CURTIS, Defendants-Appellees.	)	Filed July 22, 1987 Cathy A. Catterson, Clerk

Appeal from the United States District Court for the Central District of California

Honorable Richard A. Gadbois, District Judge, Presiding

Argued and Submitted December 2, 1986 Pasadena, CA

BEFORE: ANDERSON, TANG** AND CANBY CIRCUIT JUDGES.

Catalino Lastimosa appeals the District Court's grant of removal under the artful

pleading doctrine and subsequent dismissal of his wrongful discharge claim against Hughes Aircraft. We Affirm.

I.

We review the district court's ruling on removal jurisdiction de novo. Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 768 (9th Cir.1986).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R.21.

** Following the death of Judge Solomon, Judge Tang was randomly selected to replace him.

Hughes allegedly fired appellant in violation of company safety rules which were incorporated into the union's collective bargaining agreement. Before bringing his state court action, Lastimosa challenged the discharge

through the labor contract's grievance process. The district court properly looked beyond the face of Lastimosa's state-court complaint to determine that the discharge involved his assertion of rights under the collective bargaining agreement. See, e.g., Williams v. Caterpillar Tractor Co., 786 F.2d 928,931 N.1 (9th Cir. 1986), affirmed, 55 U.S.L.W. 4804 (Jun. 9, 1987); Bright, 780 F.2d at 769; Olguin v. Inspiration Consolidated Copper Co. 740 F.2d 1468, 1472-75 (9th Cir. 1984); Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1212 (9th Cir. 1980).

Although framed as a state-law tort and contract action, plaintiff's claim is actually grounded in the collective bargaining agreement. See Olguin, 740 F.2d 1468. Appellant's rights in his state wrongful discharge action substan-

tially depend on analysis of the terms of the labor contract and "resolution of ... federal question(s) must play a significant role in the proceedings." Williams, 786 F.2d at 931 (quoting Hunter v. United Van Lines, 746 F.2d 635, 646 (9th Cir. 1984), cert. denied, 106 S. Ct. 180 (1985)); see International Brotherhood of Electrical Workers v. Hechler, 55 U.S.L.W. 4694, 4696 (May 26, 1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218 (1985).

The California Labor Code Sections relied on by Lastimosa establish the duties of employers and provide remedies for their violation. The statutes are not directed at the general public and the policies represented by the state cause of action are not independent of the employment relation. E.G., Garibaldi v. Lucky Food Stores, Inc., 726 F.2s

1367, 1373-75 (9th Cir. 1984), cert. denied, 105 S.Ct. 2319 (1985); Friday v. Hughes Aircraft Co., 188 Cal.App.3d 117, 123-24, 225 Cal.Rptr. 89, 93-94 (Cal.Ct. App. 1986), appeal dismissed as improvidently granted, 236 Cal.Rptr. 290, 735 P.2d 117 (Cal.1987) (distinguishing Garibaldi). The labor contract provided Lastimosa no less protection than the statutes he seeks to rely upon to maintain his state cause of action. Id.; see Harper v. San Diego Transit Corp., 764 F.2d 663, 668-69 (9th Cir. 1985); Costello v. United Parcel Service, Inc., 617 F.Supp. 123, 124-25 (D.C. Pa. 1984) (interpreting Ninth Circuit Garibaldi and Olguin cases, court finds §301 of the Labor Management Relations Act vindicates same interests as state wrongful discharge action based on retaliation for filing workers compensation claim) aff'd

without published opinion, 774 F.2d 1150 (3d Cir.1985). To uphold plaintiff's state cause of action would undermine federal labor policies favoring uniform interpretation of collective bargaining agreements and exclusivity of union-employer grievance procedures. Hechler, supra; Allis-Chalmers, 471 S.Ct. at 216-18. The wrongful discharge claim is completely preempted by the Labor Management Relations Act. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983); Carter v. Smith Food King, 765 F.2d 916, 921 (9th Cir. 1985).

Thus, the district court correctly characterized the claim as an action for violation of labor contract under §301 of the Labor Management Relations Act. 29 U.S.C.§185. Section 301 claims are within the concurrent jurisdicton of

state and federal courts. Charles Dowd Box Co. v Courtney, 368 U.S. 502 (1968). Removal jurisdiction was appropriate. 28 U.S.C.§1441(a).

II.

In the district court, Lastimosa did not claim that the union breached its duty of fair representation, as he now contends on appeal. Although plaintiff earlier lodged formal charges of union discrimination with the National Labor Relations Board, in the district court he asserted that "no breach of the duty of fair representation is alleged." Opposition to Motion for Summary Judgment at 10. The district court did not err by refusing to find a breach of fair representation on plaintiff's behalf.

Without alleging that the union breached its duty of fair representation, Lastimosa's sole remedies were through

the arbitration and grievance procedures in the labor contract. Vaca v. Sipes, 386 U.S. 171, 184 (1967); Olguin, 740 F.d 1472 (citating Republic Steel Co. v Maddox, 379 U.S. 650 (1965)); see also Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 n.2 (9th Cir. 1977). In light of his unsuccessful grievance, the union's decision not to arbitrate, and the federal policy of finality in labor arbitration, the district court properly dismissed Lastimosa's action.

The district court's decision upholding jurisdiction under §1441(a) and dismissing appellant's action is **AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOS,	)	CA NO. 86-5899
	)	DC NO. 85-2780RG
Plaintiff-Appellant,	)	
	)	
v	)	
	)	ORDER
HUGHES AIRCRAFT COMPANY,	)	FILED
JACK CURTIS,	)	October 30,1987
	)	Cathy A. Cat-
Defendants-Appellees.	)	terson, Clerk
	)	U.S. Court of
	)	Appeals

BEFORE: ANDERSON, TANG & CANBY, CIRCUIT JUDGE

The memorandum disposition previously filed in this case is amended as follows:

The last sentence in the first paragraph of Section II of the memorandum is deleted and the following is substituted therefor:

"The district court did not err by failing to imply an amendment of plaintiff's complaint, to include a claim of breach of the duty of fair representation."

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggested for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CATALINO LASTIMOSA, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, a corporation; JACK CURTIS, DOES I through 50, Inclusive, Defendants.	) Filed Apr. 16, 1986 Clerk, U.S. District Court) CASE NO. CV 85-2780-SVW) FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants Hughes Aircraft Company's and John J. Curtis' motion for summary judgment came on regularly for hearing on March 24, 1986 before the Honorable Stephen V. Wilson, District Judge. Upon consideration of the oral arguments of counsel and the papers filed herein, the Court granted defendants' motion on the ground that plaintiff's wrongful discharge claim is preempted by federal labor law and his sole remedy is under

the collective bargaining agreement.

Plaintiff Lastimosa wsa an employee of Hughes Aircraft Company ("Hughes") covered by the terms of a collective bargaining agreement (CBA) between Hughes and Electronic and Space Technicians, Local 1553 of the AFL-CIO. Lastimosa was discharged after he refused to work without a mask due to his concern about the presence of abestos in his working environment. Hughes insisted that Lasimosa work without the mask after an internal investigation and an investigation by Cal-OSHA, both prompted by Lastimosa's complaints, indicated there was no significant abestos danger.

Subsequent to his discharge, Lastimosa pursued a grievance against the company according to the grievance mechanisms established by the CBA, and also filed an unfair labor practice charge

with the National Labor Relations Board. After losing in both forums, Lastimosa brought the current action for wrongful discharge under California law.

In opposing this motion, Lastimosa first argues that the case was removed improperly to federal court. The complaint here does not refer to the union or the collective bargaining agreement but does state that plaintiff was discharged without good cause and in violation of the company's written safety rules. Deposition testimony makes clear that plaintiff's claim in reality is essentially that he was discharged in violation of the provisions of the CBA pertaining to safety and discharge.

Under the doctrine of "artful pleading", removal is proper where the actual facts underlying the complaint indicate that plaintiff actually must

rely on federal law and a federal remedy to state a claim. A court is permitted to look at facts outside of the complaint to support removal. Olguin v. Inspiration Consolidated Copper, 740 F.2d 1468, 72-73 (9th C. 1984). Here, although Lastimosa avoided reference to the CBA in his complaint, the surrounding facts do indicate that the complaint is making a claim for breach of the CBA arising under federal labor law. Thus, removal was proper.

Under California law, Lastimosa's wrongful discharge claim can assert any of three theories: (1) breach of an implied-in-fact promise not to discharge without good cause, Pugh v. See's Candies, Inc., 116 Cal.App.3d 311 (1981); (2) breach of the covenant of good faith and fair dealing, Cleary v. American Airlines, Inc. 111 Cal.App.3d 443 (1980);

and (3) discharge in violation of public policy, Tameny v. Atlantic Richfield Co. 27 Cal.3d 167 (1980).

There appears to be no dispute that a wrongful discharge action based on the first and second of these theories clearly is preempted by federal labor law, specifically §301 of the Labor-Management Relations Act. Olguin, supra; Buscemi v. McDonnell Douglas Corp. 736 F.2d 1348 (9th Cir. 1984); Firstoe v. Reynolds Metal Co., 615 F.2d 1209 (9th Cir. 1980). Where an employee is covered by a CBA, state contract actions and actions for tortious breach of contract are preempted because the entire contractual relationship is contained in the CBA and federal labor law governs all aspects of the collective bargaining relations.

The Court further finds that Lastimosa's public policy claim also is

preempted. Lastimosa contends that he was discharged for complaining about safety conditions and filing a complaint with Cal-OSHA. He argues that his discharge was in violation of the public policy expressed in Cal. Labor Code §6400, which requires an employer to maintain a safe working place, and Labor Code §6310, which prohibits the discharge of an employee due his making safety complaints.

In Garibaldi v. Lucky Food Stores, 726 F.2d 1367, (9th Cir. 1984), the Court found that a wrongful termination action based on public policy was not preempted where the state statute was important for general public health and safety and did not pose any significant threat to the collective bargaining process. Whether the current action can avoid preempted thus depends on whether:

(a) the statutes cited advance a state interest in protecting the general public, an interest which is "extrinsic to" or which "transcends" the employment relationship; See, Olguin, supra, and Garibaldi, supra; and

(b) the exercise of state authority does not frustrate effective implementation of federal labor processes or interfere with or regulate the collective bargaining process. See New York Telephone v. New York State Dept. of Labor, 440 U.S. 519, 99 S.Ct. 1328 (1979); Garibaldi, supra.

With respect to the first element, the statutes here are not extrinsic to the employment relationship. Rather, they directly address and impact upon the employment relationship by directing the duties of employers and providing remedies for violations. Unlike the statute

in Garibaldi, the statutes here are not directed at the general public or some non-employment-related problem.

With respect to the second element, enforcing these statutes by way of a wrongful discharge suit would clearly interfere with the collective bargaining system and federal labor processes. The CBA here specifically dealt with the safety responsibilities of management and the procedure for handling safety complaints. It also detailed who had the responsibility and discretion for these matters, and set out a detailed grievance procedure which was to be the exclusive mechanism for handling employee complaints about violations of the CBA. Finally, the CBA established the standards and procedures for termination.

Since all of these provisions were the result of collective bargaining, enfor-

cement of the statutes by way of this wrongful discharge claim would interfere with the primacy of collective bargaining as the means for setting the terms of employment and could undercut the effectiveness of the grievance procedures. Consequently, the Court finds that federal labor law preempts and prohibits the maintenance of this public policy wrongful discharge action.

Due to the preemption of plaintiff's wrongful discharge claim, Lastimosa's sole recourse would be to bring a §301 suit for breach of the CBA. Since the CBA provides that the grievance and arbitration procedures are his sole remedy for breach, Lastimosa can only bring a §301 suit against Hughes if he also makes a claim that the union breached its duty of fair representation with respect to the handling of his

grievance. Since no such claim has been made against the union, an action cannot be maintained against Hughes. Thus, summary judgment in favor of defendants is appropriate.

DATED: April 16, 1986

STEPHEN V. WILSON
United States District
Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATALINO LASTIMOSA,	)	
	)	
Plaintiff-Appellant,	)	FILED
	)	
vs.	)	Nov. 13, 1967
	)	
HUGHES AIRCRAFT COMPANY, JACK CURTIS,	)	Clerk, U.S. District Ct.
	)	
Defendants-Appellees	)	

No. 86-5899
CV 85-2780 RG

APPEAL from the United States District Court for the _____ District of _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause, be, and hereby is

AFFIRMED.

A TRUE COPY
ATTEST

Cathy A. Catterson

Clerk of Court

By: _____
Deputy Clerk

Filed and entered July 22, 1987

APPENDIX B

§6300. **PURPOSE**

The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training and enforcement in the field of occupational safety and health.

§6310. **RETALIATION FOR FILING COMPLAINT PROHIBITED; OFFENSES**

(a) No person shall discharge or in any manner discriminate against any employee because such employee has * * * either (1) made any oral or written complaint to the division, other govern-

mental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his employer, or his representative, or (2) instituted or caused to be instituted any proceeding under or relating to his rights or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded him.

(b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of such employment by his employer because such employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to

employee safety or health, his employer, or his representative, of unsafe working conditions, or work practices, in his employment or place of employment shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for such rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

§6311. **RETALIATION FOR REFUSAL TO WORK IN VIOLATION OF HEALTH AND SAFETY STANDARDS; ACTION FOR WAGES**

No employee shall be laid off or discharged for refusing to perform work in the performance of which this code,

including Section 6400, any occupational safety or health standard or any safety order of the division or standards board will be violated, where the violation would create a real and apparent hazard to the employee or his or her fellow employees. Any employee who is laid off or discharged in violation of this section or is otherwise not paid because he or she refused to perform work in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated and where the violation would create a real and apparent hazard to the employee or his or her fellow employees shall have a right of action for wages for the time the employee is without work as a result of the layoff or discharge * * *.

§6400. **SAFE AND HEALTHFUL EMPLOYMENT AND PLACE OF EMPLOYMENT.**

Every employer shall furnish employment and a place of employment which are safe and healthful for the employees therein.

§6401. **DUTY TO FURNISH SAFETY DEVICES AND ADOPT SAFE PRACTICES AND PROCEDURES**

Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the lift, safety, and health of employees.

§6403. **FAILURE TO FURNISH SAFETY DEVICES OR ADOPT SAFE PRACTICES AND PROCEDURES**

No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards resaonably adequate to render the employment and place of employment safe.

(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

§6404. **OCCUPANCY OR MAINTENANCE OF UNSAFE OR UNHEALTHFUL PLACE OF EMPLOYMENT**

No employer shall occupy or maintain any place of employment that is not safe

and healthful.

§6406. **UNLAWFUL ACTS**

No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including himself, in such employment, or place of employment.

(d) Fail or neglect to do every other thing reasonably necessary to protect the life, safety, and health of employees.

§6407. **COMPLIANCE WITH STANDARDS, REGULATIONS, ETC.**

Every employer and every employee shall comply with occupational safety and health standards, with Section 25910 of the Health and Safety Codes, and with all rules, regulations, and orders pursuant to this division which are applicable to his own actions and conduct.

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